

GALE E. TENEFF,  
Plaintiff,  
v.  
MICHAEL J. ASTRUE, Commissioner  
of Social Security,  
Defendant.

No. CV-08-0249-CI  
ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT  
AND GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 14, 19.) Attorney Maureen J. Rosette represents Gale Teneff (Plaintiff); Special Assistant United States Attorney Thomas M. Elsberry represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 5.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

Plaintiff filed for disability insurance benefits (DIB) on April 29, 2003. (Tr. 75-77.) She alleged disability due to a broken neck and vision problems (Tr. 90, 106), with an onset date of February 1, 1991. (Tr. 75.) Her claim was denied initially and on

1 reconsideration. Plaintiff requested a hearing before an  
2 administrative law judge (ALJ), which was held on December 6, 2005,  
3 before ALJ Mary Bennet Reed. (Tr. 357-422.) ALJ Reed issued an  
4 unfavorable decision on May 8, 2006. (Tr. 17-27.) After the  
5 Appeals Council denied review, Plaintiff appealed the ALJ's decision  
6 to the United States District Court for the Eastern District of  
7 Washington. On May 27, 2007, federal Magistrate Judge Michael  
8 Leavitt ordered the case remanded to the Commissioner for additional  
9 proceedings. (Tr. 451-62.) A second hearing was held on February  
10 7, 2008, before ALJ R.J. Payne. (Tr. 507-529.) Plaintiff, who was  
11 represented by counsel, and medical experts Robert Karsh, M.D., and  
12 Scott Mabee, Ph.D., testified. ALJ Payne denied benefits on March  
13 11, 2008, and the Appeals Council denied review. (Tr. 436-46, 423-  
14 26.) The instant matter is before this court pursuant to 42 U.S.C.  
15 § 405(g).

#### 16 **STATEMENT OF THE CASE**

17 The facts of the case are set forth in detail in the transcript  
18 of proceedings and are briefly summarized here. At the time of the  
19 hearing, Plaintiff was 51 years old with a high-school education,  
20 three years of college, and vocational training as a surgical  
21 technician. (Tr. 96.) Plaintiff has past work experience as a  
22 surgical technician. (Tr. 91.) Plaintiff's date of last insured for  
23 DIB purposes is June 30, 1995. (Tr. 436.) She was 36 at the time  
24 of her alleged onset date, and 40 years old at the time she last met  
25 the insured status requirements for DIB. (Tr. 18.) At the second  
26 hearing, Plaintiff reported she quit her job due to marital stress  
27 and problems seeing. (Tr. 526.) She stated she had always had bad  
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1 vision. (*Id.*)

2 **ADMINISTRATIVE DECISION**

3 The ALJ found Plaintiff's date of last insured for DIB purposes  
4 was June 30, 1995. (Tr. 436.) At step one, ALJ Payne found  
5 Plaintiff had not engaged in substantial gainful activity from the  
6 alleged onset date through the date of last insured. (Tr. 438.) At  
7 step two, he found Plaintiff had severe impairments of "degenerative  
8 disk disease of the cervical regions of the spine and osteoarthritis  
9 of the hands." (*Id.*) He found the following conditions, diagnosed  
10 during the period at issue, did not pose more than minimal  
11 limitations on her ability to perform basic work activities:  
12 temporomandibular joint syndrome; myopia; spastic bowel secondary to  
13 reported abdominal pain; depression and post traumatic stress  
14 disorder (PTSD). (Tr. 439-40.) The ALJ determined at step three  
15 the impairments, alone and in combination, did not meet or medically  
16 equal one of the listed impairments in 20 C.F.R., Appendix 1,  
17 Subpart P, Regulations No. 4 (Listings).<sup>1</sup> (Tr. 440.) The ALJ found  
18 Plaintiff's statements regarding her symptoms and limitations were  
19 "not credible to the extent that they are inconsistent with the  
20 residual functional capacity" assessed. (Tr. 440-41.) At step four,  
21 he determined Plaintiff could perform the full range of medium work  
22 through her date of last insured. She would have been able to  
23 perform work that involved lifting or carrying no more than 25  
24 pounds frequently and 50 pounds occasionally. (Tr. 440.) The ALJ  
25 concluded Plaintiff could perform her past relevant work as a

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26 <sup>1</sup> At the hearing, Plaintiff's representative stipulated no  
27 Listings had been met or equaled. (Tr. 528-529.)  
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1 surgical technician, which is classified as "light work"; therefore,  
2 she was not under a disability as defined by the Social Security Act  
3 from her alleged date of onset until her date of last insured. (Tr.  
4 446.)

#### 5 STANDARD OF REVIEW

6 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
7 court set out the standard of review:

8 A district court's order upholding the Commissioner's  
9 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
10 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
11 Commissioner may be reversed only if it is not supported  
12 by substantial evidence or if it is based on legal error.  
13 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
14 Substantial evidence is defined as being more than a mere  
15 scintilla, but less than a preponderance. *Id.* at 1098.  
16 Put another way, substantial evidence is such relevant  
17 evidence as a reasonable mind might accept as adequate to  
18 support a conclusion. *Richardson v. Perales*, 402 U.S.  
19 389, 401 (1971). If the evidence is susceptible to more  
20 than one rational interpretation, the court may not  
21 substitute its judgment for that of the Commissioner.  
22 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*  
23 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

24 The ALJ is responsible for determining credibility,  
25 resolving conflicts in medical testimony, and resolving  
26 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
27 Cir. 1995). The ALJ's determinations of law are reviewed  
28 *de novo*, although deference is owed to a reasonable  
construction of the applicable statutes. *McNatt v. Apfel*,  
201 F.3d 1084, 1087 (9th Cir. 2000).

#### 21 SEQUENTIAL PROCESS

22 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
23 requirements necessary to establish disability:

24 Under the Social Security Act, individuals who are  
25 "under a disability" are eligible to receive benefits. 42  
26 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
27 medically determinable physical or mental impairment"  
28 which prevents one from engaging "in any substantial  
gainful activity" and is expected to result in death or  
last "for a continuous period of not less than 12 months."  
42 U.S.C. § 423(d)(1)(A). Such an impairment must result

1 from "anatomical, physiological, or psychological  
2 abnormalities which are demonstrable by medically  
3 acceptable clinical and laboratory diagnostic techniques."  
4 42 U.S.C. § 423(d)(3). The Act also provides that a  
5 claimant will be eligible for benefits only if his  
6 impairments "are of such severity that he is not only  
7 unable to do his previous work but cannot, considering his  
8 age, education and work experience, engage in any other  
9 kind of substantial gainful work which exists in the  
10 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
11 the definition of disability consists of both medical and  
12 vocational components.

13 In evaluating whether a claimant suffers from a  
14 disability, an ALJ must apply a five-step sequential  
15 inquiry addressing both components of the definition,  
16 until a question is answered affirmatively or negatively  
17 in such a way that an ultimate determination can be made.  
18 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
19 claimant bears the burden of proving that [s]he is  
20 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
21 1999). This requires the presentation of "complete and  
22 detailed objective medical reports of h[is] condition from  
23 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
24 404.1512(a)-(b), 404.1513(d)).

25 It is the role of the trier of fact, not this court, to resolve  
26 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
27 supports more than one rational interpretation, the court may not  
28 substitute its judgment for that of the Commissioner. *Tackett*, 180  
F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
Nevertheless, a decision supported by substantial evidence will  
still be set aside if the proper legal standards were not applied in  
weighing the evidence and making the decision. *Browner v. Secretary*  
*of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
there is substantial evidence to support the administrative  
findings, or if there is conflicting evidence that will support a  
finding of either disability or non-disability, the finding of the  
Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
1230 (9<sup>th</sup> Cir. 1987).

**ISSUES**

The question is whether the ALJ's decision on remand is supported by substantial evidence and free of legal error. Plaintiff argues the ALJ erred when he: (1) found she had no severe mental impairments; (2) rejected the opinions of her treating physicians; and (3) relied on medical expert testimony. (Ct. Rec. 15 at 14-17.)

**DISCUSSION****A. Step Two - Severe Mental Impairment**

Plaintiff argues the ALJ erred in his step two findings because he failed to give legally sufficient reasons for rejecting the medical opinions of her treating doctors, Kenneth DeSeve, Ph.D., and Robert Baxley, M.D. Plaintiff contends she has submitted adequate medical evidence, relevant to the period between February 1991 and June 30, 1995, to support a finding of severe mental impairments. (Ct. Rec. 15 at 12-17.) Defendant responds the ALJ gave specific and legitimate reasons for rejecting the doctors' opinions that Plaintiff suffered severe mental impairments between 1991 and 1995. (Ct. Rec. 20 at 9.)

After summarizing the medical evidence, ALJ found Dr. DeSeve's one-page summary opinion dated September 14, 2005, and based on his treatment of Plaintiff from August 14, 1997, until May 19, 1998, was not supported by treatment notes from 1997-98, objective psychological testing or evaluations. (Tr. 444.) He reasoned Dr. DeSeve's opinions were based solely on Plaintiff's self report of her symptoms in August 1997, that she was "withdrawn from friends and family and unable to maintain even superficial involvements with

1 others." As found by the ALJ, Dr. DeSeve admitted his opinions were  
2 not based on any formal examination, and no supporting records were  
3 submitted in support of his opinion.<sup>2</sup> (Tr. 234, 341, 444.) (*Id.*)

4 Regarding Dr. Baxley's opinions rendered in October 2005, the  
5 ALJ noted Dr. Baxley treated Plaintiff from September 28, 2004,  
6 until March 14, 2005. (Tr. 235, 445.) He found Dr. Baxley's Mental  
7 Medical Source Statement check-box responses were not supported by  
8 his clinical examination, or treatment notes, or by Plaintiff's  
9 activities of daily living during the claimed period of disability  
10 or when he was treating her. (Tr. 445.) It is noted that neither  
11 Dr. DeSeve nor Dr. Baxley had a treating relationship with Plaintiff  
12 during her period of insured status. (Tr. 234-36.)

13 At step two of the sequential evaluation, the ALJ determines  
14 whether a claimant suffers from a "severe" impairment, *i.e.*, one  
15 that significantly limits her physical or mental ability to do basic  
16 work activities. 20 C.F.R. § 404.1520(c). To satisfy step two's  
17 requirement of a severe impairment, the claimant must prove the  
18 existence of a physical or mental impairment by providing medical  
19 evidence consisting of signs, symptoms, and laboratory findings; the  
20 claimant's own statement of symptoms alone will not suffice. 20  
21 C.F.R. § 404.1508. The fact that a medically determinable condition  
22 exists does not automatically mean the symptoms are "severe," or

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24 <sup>2</sup> Acknowledging the Commissioner's duty to develop the record  
25 in disability proceedings, attempts were made by the Commissioner to  
26 obtain additional records from Drs. DeSeve, Baxley and Edward  
27 Treyve, M.D., in December 2005. (Tr. 344-45.)

1 "disabling" as defined by the Social Security regulations. See,  
2 e.g., *Edlund*, 253 F.3d at 1159-60; *Fair v. Bowen*, 885 F.2d 597, 603  
3 (9<sup>th</sup> Cir. 1989; *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9<sup>th</sup> Cir.  
4 1985).

5 The Commissioner has passed regulations which guide dismissal  
6 of claims at step two. Those regulations state an impairment may be  
7 found to be not severe when "medical evidence establishes only a  
8 slight abnormality or a combination of slight abnormalities which  
9 would have no more than a minimal effect on an individual's ability  
10 to work." SSR 85-28 at \*3.<sup>3</sup> "The severity requirement cannot be  
11 satisfied when medical evidence shows that the person has the  
12 ability to perform basic work activities, as required in most jobs."  
13 *Id.* Basic work activities include: "walking, standing, sitting,  
14 lifting, pushing, pulling, reaching, carrying, or handling; seeing,  
15 hearing, speaking; understanding, carrying out and remembering  
16 simple instructions; responding appropriately to supervision,  
17 coworkers, and usual work situation." *Id.* A mental impairment  
18 generally is considered non-severe for purposes of step two if the  
19 degree of limitation in the three functional areas of activities of  
20 daily living, social functioning, and concentration, persistence or  
21 pace is rated as "none" or "mild" and there have been no episodes of  
22 decompensation. 20 C.F.R. § 404.1520a(d)(1).

23 As explained in the Commissioner's policy ruling, "medical  
24 evidence alone is evaluated in order to assess the effects of the

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25 <sup>3</sup> The Supreme Court upheld the validity of the Commissioner's  
26 severity regulation, as clarified in SSR 85-28, in *Bowen v. Yuckert*,  
27 482 U.S. 137, 153-154 (1987).  
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1 impairments on ability to do basic work activities." SSR 85-28.  
2 Nonetheless, "credibility determinations do bear on evaluation of  
3 medical evidence when an ALJ is presented with conflicting medical  
4 opinions or inconsistency between a claimant's subjective complaints  
5 and [her] diagnosed conditions." *Webb v. Barnhart*, 433 F.3d 683,  
6 688 (9<sup>th</sup> Cir. 2005). Where, as here, clinical records and objective  
7 medical evidence are inconsistent with afflictions claimed,  
8 Plaintiff's credibility is considered at step two.<sup>4</sup> *Id.*

9 In determining whether a claimant has a severe impairment, the  
10 ALJ evaluates the medical evidence submitted and must explain the  
11 weight given to the opinions of accepted medical sources in the  
12 record. Agency regulations distinguish among the opinions of three  
13 types of accepted medical sources: (1) sources who have treated the

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15 <sup>4</sup> The ALJ made extensive credibility findings, supported by  
16 the record, and concluded Plaintiff's statements were not credible.  
17 (Tr. 441-42.) For example, the record supports the ALJ's "clear and  
18 convincing" findings that Plaintiff's ability to take care of her  
19 aging parents and manage a horse farm, as well as her minimal  
20 treatment during insured period, indicate she was able to perform  
21 medium work and return to her past relevant work as a surgical  
22 technician. In addition, the objective medical evidence from the  
23 relevant period show no reports of persisting pain or limitations or  
24 treatment of conditions other than acute problems resulting from  
25 spousal abuse. (Tr. 135-40, 162-64, 369-70, 371-72, 442.) The ALJ  
26 gave "clear and convincing" reasons for discounting Plaintiff's  
27 symptom allegations. See *Thomas v. Barnhart*, 278 F.3d 947, 957 (9<sup>th</sup>  
28 Cir. 2002).

1 claimant; (2) sources who have examined the claimant; and (3)  
2 sources who have neither examined nor treated the claimant, but  
3 express their opinion based upon a review of the claimant's medical  
4 records. 20 C.F.R. § 404.1527. A treating physician's opinion  
5 carries more weight than an examining physician's, and an examining  
6 physician's opinion carries more weight than a non-examining  
7 reviewing or consulting physician's opinion. *Benecke v. Barnhart*,  
8 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004); *Lester v. Chater*, 81 F.3d 821,  
9 830 (9<sup>th</sup> Cir. 1995), The Commissioner must provide "clear and  
10 convincing" reasons for rejecting the uncontradicted opinion of a  
11 treating or examining physician. *Lester*, 81 F.3d at 830 (citation  
12 omitted). If the opinion is contradicted, it can only be rejected  
13 for specific and legitimate reasons that are supported by  
14 substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d  
15 1035, 1043 (9<sup>th</sup> Cir. 1995).

16 Historically, the courts have recognized the following as  
17 specific, legitimate reasons for disregarding a treating or  
18 examining physician's opinion: conflicting medical evidence; the  
19 absence of regular medical treatment during the alleged period of  
20 disability; the lack of medical support for doctors' reports based  
21 substantially on a claimant's subjective complaints of pain; medical  
22 opinions that are brief, conclusory, and inadequately supported by  
23 medical evidence. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9<sup>th</sup>  
24 Cir. 2005); *Flaten v. Secretary of Health and Human Servs.*, 44 F.3d  
25 1453, 1463-64 (9<sup>th</sup> Cir. 1995); *Fair*, 885 F.2d at 604.

26 Here, the ALJ's reasons for rejecting Dr. DeSeve's opinions are  
27 specific and legitimate. A review of the record shows that Dr.  
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1 DeSeve's 1998 report is unsupported by clinical psychological  
2 testing results or contemporaneous treatment notes. (Tr. 162-64.)  
3 His diagnoses of PTSD and adult adjustment disorder with anxiety and  
4 depression were based on Plaintiff's self-report, unspecified  
5 medical records, and Dr. DeSeve's observations made three years  
6 after the expiration of the insured period at issue. (Tr. 162-64.)  
7 Medical opinions based on a claimant's subjective complaints are  
8 properly rejected as unreliable where the claimant's credibility has  
9 been properly discounted. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149  
10 (9<sup>th</sup> Cir. 2001). As discussed above, the ALJ gave "clear and  
11 convincing" reasons in his decision for discounting Plaintiff's  
12 self-report. (Tr. 441-45.)

13 Regarding Dr. DeSeve's one-page opinion letter dated September  
14 14, 2005, the ALJ specifically noted that Dr. DeSeve acknowledged  
15 the lack of formal examination "with respect to disability." (Tr.  
16 444.) Citing symptoms reported by Plaintiff well after the period  
17 at issue and the lack of supporting clinical evidence,<sup>5</sup> the ALJ  
18 properly rejected Dr. DeSeve's brief opinion that "it would be  
19 reasonable to conclude" Plaintiff's capacity to work would be "quite  
20 limited." (Tr. 234, 444.) Thus, the unreliable medical evidence  
21 presented from Dr. DeSeve, and properly rejected by the ALJ, is  
22 insufficient to establish severe mental impairments. 20 C.F.R. §  
23 404.1508; *Bayliss*, 427 F.3d at 1217; *Macri v. Chater*, 93 F.3d 540,  
24 545 (9<sup>th</sup> Cir. 1996).

25 Likewise, the ALJ's reasons for rejecting Dr. Baxley's opinions

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26 <sup>5</sup> As mentioned above, ALJ Reed's efforts to obtain Dr. DeSeve's  
27 records were unsuccessful. (Tr. 345, 376-77.)  
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1 are legally sufficient and supported by the record. (Tr. 300-309,  
2 342-43, 445.) Dr. Baxley treated Plaintiff for six months, from  
3 September 2004 to March 2005, in connection with malpractice  
4 litigation against Plaintiff's former therapist, with whom she had  
5 had a romantic relationship. (Tr. 300.) As found by the ALJ, Dr.  
6 Baxley's Mental Medical Source Statement check box form reflected  
7 marked and severe limitations that are not supported by Dr. Baxley's  
8 own treatment notes, psychological testing, or other evidence in the  
9 record related to the period at issue. (Tr. 445.) Further,  
10 Plaintiff's mental state in late 2004 through March 2005, as  
11 assessed by Dr. Baxley, does not establish a severe mental  
12 impairment from 1991 until June 30, 1995. The ALJ did not err in  
13 his evaluation of the medical evidence presented by Drs. Baxley and  
14 DeSeve. *Flaten*, 44 F.3d at 1463. Plaintiff has failed to meet her  
15 burden at step two to provide the requisite medical evidence to  
16 establish a severe mental impairment. Therefore, the ALJ did not  
17 err in his evaluation of Plaintiff's mental impairments at step two.

18 **B. Reliance on Medical Expert Testimony**

19 Plaintiff argues the ALJ improperly relied on medical expert  
20 testimony in finding that the evidence did not establish a severe  
21 mental impairment in 1991 to June 1995. (Ct. Rec. 15 at 14-15.)  
22 However, as discussed above, the ALJ considered other evidence  
23 besides Dr. Mabee's testimony and found the medical evidence  
24 presented was unreliable for several reasons, including the total  
25 lack of contemporaneous objective testing results or treatment  
26 notes.

27 It is the responsibility of the ALJ to resolve conflicts and  
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1 ambiguities in the medical evidence. *Richardson*, 402 U.S. at 400.  
2 Further, it is well-settled that the ALJ may seek the assistance of  
3 a non-examining medical expert in disability adjudication. *Andrews*,  
4 53 F.3d at 1041 (*citing Magallanes v. Bowen*, 881 F.2d 747, 753 (9<sup>th</sup>  
5 Cir. 1989)). Testimony of a medical expert may serve as substantial  
6 evidence when supported by other evidence in the record. *Id.*

7 ALJ Payne summarized medical expert testimony in which Dr.  
8 Mabee, after a review of the entire record, opined the record  
9 contained no information that could establish a clear mental  
10 disorder diagnosis during the relevant period at issue. As noted by  
11 the ALJ, Dr. Mabee opined that although Plaintiff reported a history  
12 of domestic violence, her uncorroborated reports alone could not be  
13 a basis for the diagnosis of a mental impairment. (Tr. 440, 517-  
14 20.)

15 Dr. Mabee's testimony is supported by the record in its  
16 entirety. According to her testimony, Plaintiff quit her job  
17 because her spouse demanded it and due to stress from her marital  
18 situation. (Tr. 90, 396.) In 1994, treating physician Dr. Rowbotham  
19 reported Plaintiff was being treated conservatively for arthritis  
20 pain that was "intermittently controlled," as well as depression  
21 symptoms due to marital discord. In July and December of 1994, she  
22 told him that she was doing well, except for her marital discord.  
23 (Tr. 135-40.) In 1994, Plaintiff was engaged in an active life  
24 traveling to Mexico, going to California for cosmetic surgery; and  
25 she was raising her young daughter. After 1995, she reported caring  
26 for her aging parents and managing a farm with horses that she  
27 trained. (Tr. 369-70, 371-72, 442-43.) Further, as found by the  
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1 ALJ, she did not seek treatment of neck pain until 1997; the  
2 earliest mental health records begin in 1998. (Tr. 162-64.)

3 An independent review of the entire record shows that  
4 substantial evidence supports Dr. Mabee's opinion that the record  
5 does not contain firm data to establish a severe mental impairment  
6 between February 1991 and June 30, 1995. (Tr. 517.) Without  
7 objective, contemporaneous evidence, no foundation existed for a  
8 finding of severe mental limitations. The ALJ did not err in his  
9 reliance on Dr. Mabee's opinions at step two.

#### 10 **C. RFC Findings**

11 Plaintiff argues that the ALJ improperly rejected treating  
12 physician Kirk Rowbotham, M.D.'s opinion contained in a one  
13 paragraph letter dated October 24, 2005. (Ct. Rec. 15 at 17; Tr.  
14 298.) This argument is without merit. In the four sentence letter,  
15 Dr. Rowbotham stated that, based on Plaintiff's complaints during  
16 time he saw her (April 1994 through December 1996), "it is  
17 reasonable to say she would have been able to do only light level  
18 work." (Tr. 298.) The ALJ properly disregarded this opinion as,  
19 (1) unsupported by Dr. Rowbotham's own treatment notes, which  
20 reported mild arthritic symptoms; (2) inconsistent with his  
21 examination of Plaintiff during the period at issue; and (3)  
22 inconsistent with the frequency and level of treatment ordered.  
23 (Tr. 135-40, 444, 445.) Further, the opinion regarding Plaintiff's  
24 capacity to work is conclusory, brief and written nine years after  
25 Plaintiff's treatment relationship with Dr. Rowbotham ended. (Tr.  
26 445.) These are specific and legitimate reasons to reject Dr.  
27 Rowbotham's opinion. *Bayliss*, 427 F.3d at 1217.

1 Even assuming Plaintiff were limited to light duty work during  
2 that time, the ALJ's step four finding that she can still perform  
3 her past relevant work as a surgical technician remains undisturbed.  
4 As noted by the ALJ (Tr. 446), Plaintiff's past relevant work is  
5 classified as light level work, consistent with Dr. Rowland's 2005  
6 letter, by the *Dictionary of Occupational Titles*. U.S. Department  
7 of Labor, *Dictionary of Occupational Titles*, 079.374-022 (4<sup>th</sup> ed.  
8 1991). In addition, vocational expert testimony from Plaintiff's  
9 prior administrative hearing established her past relevant work as  
10 light level. (Tr. 417.) Finally, Plaintiff described her work as  
11 a surgical technician as requiring minimal carrying/lifting of less  
12 than ten pounds, standing 50 percent and walking 50 percent of the  
13 time. (Tr. 91.) Because the final disability determination would  
14 be unchanged if Dr. Rothbothum's exertional level opinion were  
15 credited, the RFC error alleged would be harmless. *Stout v.*  
16 *Commissioner, Social Sec. Admin.*, 454 F.3d 1050, 1056 (9<sup>th</sup> Cir.  
17 2006); *Burch v. Barnhart*, 400 F.3d 676, 682 (9<sup>th</sup> Cir. 2005); *Curry v.*  
18 *Sullivan*, 925 F.2d 1127, 1131 (9<sup>th</sup> Cir. 1990) (where corrected error  
19 does not change the outcome, the error is harmless).

#### 20 CONCLUSION

21 The ALJ thoroughly detailed the medical evidence in the record  
22 and properly evaluated medical source opinions. His determination  
23 that Plaintiff was not disabled during her insured period for  
24 purposes of DIB is based on substantial evidence and free of legal  
25 error. Accordingly,

#### 26 IT IS ORDERED:

27 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is  
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1 **DENIED;**

2 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 19**) is

3 **GRANTED;**

4 The District Court Executive is directed to file this Order and  
5 provide a copy to counsel for Plaintiff and Defendant. Judgment  
6 shall be entered for Defendant, and the file shall be **CLOSED**.

7 DATED August 25, 2009.

8  
9 S/ CYNTHIA IMBROGNO  
10 UNITED STATES MAGISTRATE JUDGE  
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